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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1490

BETHLEHEM MINES CORPORATION
and
REPUBLIC STEEL CORPORATION,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA, et al.,
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE FACTS

Petitioners' Statement omits full description of the first round of proceedings which gave rise to respondents' motion for attorneys fees. On Sunday night, June 21, 1970, the coal miners employed by petitioners refused to enter their mines because of petitioners' failure to

provide safe working conditions undergrou and the failure of the United States Bure of Mines to require petitioners to confor to the health and safety standards estab- lished in the 1969 Federal Coal Mine Heal and Safety Act, 30 U.S.C. 801, et seq.

Within hours, the nation's major ste producers, owners of "captive" coal mines filed suits under Section 301 of the Labo Management Relations Act, 29 U.S.C. 185, the United States District Court for the Western District of Pennsylvania to enjoi the walkouts. Hearings on the cases com- menced on June 23, 1970, at which time un signed counsel urged alternatively that t Norris-LaGuardia Act, 29 U.S.C. 101, et s deprived the court of jurisdiction and th defendants were prepared to prove, pursu- ant to 29 U.S.C. 143, the existence of "abnormally dangerous" working conditions in the coal mines in question.

Refusing to hear the miners' evidenc the district court at the beginning of th second day of hearings announced that it would enjoin the walkout. When regular United Mine Workers counsel retired to chambers with company counsel to work ou the terms of the orders, undersigned

counsel was retained as counsel by various UMWA local unions. Not surprisingly, when court reconvened, the orders which union and company had agreed to did not enjoin the districts or international, but did enjoin the locals, their officers and members and required the miners to return to work regardless of dangerous conditions then prevailing. On behalf of the locals and certain individuals, undersigned counsel noticed appeals within hours and promptly moved in the Court of Appeals for summary reversal.

Two days later, the Court of Appeals heard emergency argument, and on June 30, less than a week after the injunctions were entered, the Court of Appeals unanimously granted summary reversal and remanded the cases to the district court. (A copy of that decision is appended hereto as Respondents' Appendix. The Court of Appeals decision is highly relevant for it reveals the context within which the request for fees was made, that the motion was occasioned by an egregious abuse of federal equity powers in a labor dispute -- the very sort of abuse that

the Norris-LaGuardia Act was designed to pr vent and redress.)

Shortly after remand, undersigned coun sel filed their motion for fees pursuant to Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107. The same district judge whose decision had been summarily reversed thereafter ruled that his original injunction orders had not been erroneously or improvidently entered and that the motions [1] for fees were premature.

On February 3 and 28, 1972, the United States Court of Appeals unanimously reverse the district court holding, that all counsel were entitled to fees. [2] [3] Those decisions are reported at 456 F.2d 483 and 456 F.2d 1233.

1/ A month after counsel herein filed a motion for fees, regular UMWA counsel, the same counsel who had worked out the terms of the orders and failed to promptly seek summary reversal, filed identical motions for fees.

2/ Judge Kalodner dissented in part arguing that defendants could recover fees in excess of the injunction bonds only by commencing an ancillary action.

3/ Petitioners herein, along with the other steel producers involved in the original appeals, United States Steel /Footnote continued on following page./

I. AN AWARD OF ATTORNEY'S FEES IS CONSISTENT WITH THIS COURT'S DECISION IN THE BOYS MARKETS, INC. V. RETAIL CLERKS UNION, LOCAL 770, 398 U.S. 235 (1970), THE CONGRESSIONAL POLICY UNDERLYING THE FEDERAL LABOR STATUTES AND THE "ACCOMMODATION DOCTRINE"

Boys Markets holds that in certain carefully limited circumstances the principal anti-injunction section of the Norris-LaGuardia Act -- Section 4 (29 U.S.C. 104) -- should be relaxed so that a union's contractual no-strike obligation may be specifically enforced. Despite the explicit limiting language of this Court that its holding was "a narrow one" which did not "underscore the vitality of the Norris-LaGuardia Act", petitioners nevertheless initially contend that as a direct result of Boys Markets, every other provision of the Act, particularly those involving procedural safeguards, should

3/ [Footnote continued from preceding page.] Corporation and Jones & Laughlin Steel Corporation, have filed a Petition for Writ of Certiorari involving the February 3, 1972 opinion entered by the Third Circuit (No. 71-1409).

likewise be considered of no effect whenever an employer launches a lawsuit under §§ 301 of LMRA, 29 U.S.C. 185. Not surprisingly, there is nothing in the way of authority or policy to support such a wooden and heavy-handed proposition.

Apart from Section 4's ban on injunctions, the bulk of the Norris-LaGuardia Act is designed to correct the many procedural abuses that infected administration of the labor injunction in the federal courts during the first third of this Century. This Court [4] and commentators [5] have consistently recognized that procedural abuse was the chief evil to be remedied, and that in the eyes of the Act's draftsmen, "Emphasis upon procedural safeguards in the use of the injunction must therefore rank first." F. Frankfurter and N. Greene, The Labor Injunction 202 (1930). Accordingly, § 7 of the Act creates a protective procedural scheme -- including curbs on ex parte injunctions, specific findings required from the court, and provision for full and

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4/ See, e.g., Milk Wagon Drivers' Union v. Lake Valley Co., 311 U.S. 91, 102 (1940) and Boys Markets, 398 U.S. at 250.

5/ See, e.g., Note, The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1594 (1970).

complete hearing after notice -- to control any application for injunctive relief in a labor dispute. 6/ Section 7 also provides that the damage caused by wrongful issuance of an injunctive order, including attorney's fees and other costs of a successful defense, shall be borne by the moving party.

The present case is an apt illustration of the continuing need for scrupulous adherence to the procedural safeguards of § 7. Here the district court in a truncated hearing accomplished nearly every procedural error available, and ordered coal miners to return to work in unsafe mines, only to be reversed -- and chastised severely -- by a unanimous Court of Appeals in less than a week.

The procedural safeguards of § 7 and other provisions of the Act 7/ are in no

6/ The procedures of Federal Rule 65 are less strict in many particulars. See 25-27, infra.

7/ E.g., § 8, 29 U.S.C. 108 (clean hands requirement); § 9, 29 U.S.C. 109 (limiting the scope of labor injunctions); § 10, 29 U.S.C. 110 (expedited appeal).

way undercut by the holding or rationale of Boys Markets. There the Court decided a narrow question: whether Norris-LaGuardia's flat ban on labor injunctions should yield to the pro-arbitration policy of the subsequently enacted LMRA, when suit is brought to enforce a union's no-strike promise, and when the strike is over an arbitrable grievance. Boys Markets answers in the affirmative, but the opinion takes great pains to limit any conflict with the policies of Norris-LaGuardia. 8/ Only "the anti-injunction section" of Norris-LaGuardia -- or "§ 4" -- is affected by the decision. 398 U.S. at 250, 251.

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act . . . . Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." Id., at 253-254.

8/ Five times the Court repeats that the judicial duty is to "accommodate", "reconcile", and "harmonize" Norris-LaGuardia and § 301 of LMRA. 398 U.S. at 241, 249, 250, 251.

Boys Markets does not gratuitously "repeal" the other sections of Norris-LaGuardia, any more than Congress did when providing for enforcement of collective bargaining agreements in the federal courts. 9/ But that is precisely what petitioners urge.

Boys Markets takes its place in a long line of cases 10/ that strive to achieve accommodation between particular provisions of Norris-LaGuardia and "ostensibly inconsistent provisions" of later labor legislation. 398 U.S. at 250. Obviously there is no occasion for invoking the Accommodation Doctrine -- nothing to "harmonize" or "reconcile", id. at 241, 251, and no reason

9/ See Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 223 (1962)(dissenting opinion adopted by the Court in Boys Markets): "Congress, clearly, had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits . . ." See also Remarks of Senator Taft, 93 Cong. Rec. 6603 (80th Cong., 1st Sess., June 5, 1947).

10/ See generally Note, Accommodation of the Norris-LaGuardia Act to other Federal Statutes, 72 Harv. L. Rev. 354 (1958).

for Norris-LaGuardia to give way -- absent an insistent clash of provisions or policies. In the case of § 301 of LMRA, neither letter nor spirit collides with the attorney's fee provision or the other procedural safeguards of Norris-LaGuardia's § 7. The Boys Markets opinion itself assumes that the procedural provisions retain "vitality".[11] No court has held otherwise, and recent commentary has properly judged that after Boys Market there is greater

11/ The Court's opinion expressly invokes Norris-LaGuardia's "clean hands" requirement, § 8, 29 U.S.C. 108, to show that the Act itself favors arbitration. In stating the findings that must be made before an injunction may issue in an employer's contract suit, the Court follows § 7 of Norris-LaGuardia. See 398 U.S. at 254. The Court of Appeals noted that the finding required by § 7(e) (public officers unable to protect employer properly) would not be appropriate in the usual contract enforcement case, and to that limited extent § 7 must be "accommodated to the policy underlying § 301" and relaxed accordingly. See Petitioners' Appendix E, at 48-49.

need for the procedural protections of § 7. [12] In a strictly analogous situation, the lower courts have continued to enforce Norris-LaGuardia's procedural safeguards -- including the attorney's fee provision [13] -- in employer suits brought under the Railway Labor Act even though this Court has held that accommodation of the two enactments necessitates relaxation of Norris-LaGuardia's anti-injunction section. [14]

An arid notion of "uniformity" is all that petitioners offer to justify judicial

12/ See Note, The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1602 (1970) ("The Court should . . . resolve procedural questions in favor of the union . . . .").

13/ See, Elgin, J. & E. Ry. v. Brotherhood of RR. Trainmen, 302 F.2d 540 (C.A. 7, 1962) (§ 7 attorney's fee provision applied in Railway Labor Act suit). See also Rutland Ry. Corp. v. Brotherhood of Locomotive Eng., 307 F.2d 21 (C.A. 2, 1962) (§ 8 "clean hands" provision applied).

14/ Brotherhood of RR. Trainmen v. Chicago River & I.R. Co., 353 U.S. 30 (1957). "In subsequent cases, however, the courts have followed the Norris-LaGuardia procedural safeguards . . . ." Note, The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1606, n. 61 (1970).

repeal of the attorney's fee provision. 15/ It is true that some states have attorney's fee provisions in their "little Norris-LaGuardia" enactments, and that others do not. But no principle of federal law requires federal equity practice to conform to those state procedures that are least protective of employees' rights. Congress has an obviously legitimate interest in legislating to guard against and to redress abuse of federal injunctive powers. Certainly in the case of attorney's fees, the difference between federal and state practice could not possibly result in the phenomenon that troubled the Boys Markets Court, "a wholesale dislocation in the allocation of judicial business between the state and federal courts." 398 U.S. at 247. The situation at hand is squarely covered by the sensible language of Boys Markets:

15/ The notion that employer suits are unduly "chilled" by the provision is discussed by the Court of Appeals, Petitioners' Appendix E, at 49-50, and properly discarded.

> "[U]niformity . . . could hardly require, as a practical matter, that labor law be administered identically in all courts, for undoubtedly a certain diversity exists among state and federal systems in matters of procedural and remedial detail . . . ." Id., at 246.

II. FEES WERE PROPERLY AWARDED FOLLOWING THE SUMMARY REVERSAL OF THE INJUNCTION ORDERS BY THE COURT OF APPEALS

Petitioners ask the Court to decide whether, in the circumstances of this case, there was a "final decision" in the injunctive proceedings below, rendering the motion for attorney's fees timely. Two separate panels of the Court of Appeals unanimously agreed that the injunctive phase of this lawsuit [16] has long since been terminated "for all practical purposes." See Petitioners' Appendix E, at 43 and 45. The issue turns wholly on the

16/ The pendency of respondents' counterclaims below in no way affects the finality of the injunctive side of the proceeding. That is the holding of Madison Shipping Corp. v. National Maritime Union, 204 F. Supp. 22, 23 (E.D. Pa., 1962), a case mistakenly cited by petitioners.

particular facts of the instant case, [17] and falls far short of the level of significance that would warrant review by this Court.

There is no conflict between the cases cited by petitioners and the Court of Appeals' holding below. The principle of petitioners' cases is that a defendant's motion to recover damages caused by wrongful preliminary restraint might be deferred when a lawsuit is moving on for trial of the plaintiff's request for a permanent

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17/ After the erroneous preliminary injunctions were vacated by the Court of Appeals on June 30, 1970, the employers renewed their request for preliminary relief and the matter came on for de novo hearing on July 9. By that time, however, there was no case to be heard -- the stoppages complained of had ceased, and none were anticipated. The parties so stipulated and the cause was continued indefinitely. In the ensuing period of almost two years petitioners have never sought to bring the action back to life. Should they ever do so, they would have to contend with § 9 of Norris-LaGuardia, 29 U.S.C. 109, which says that every labor injunction "shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint . . . ." See Virginian Ry. Co. v. System Federation, 300 U.S. 515 (1937).

injunction. [18] But the injunctive proceedings in the present case came to final rest almost two years ago, and there never will be a trial on permanent injunctive relief.[19]

In Norris-LaGuardia cases, moreover, there are special reasons not to postpone a defendant's motion for fees pending decision of the employer's request for permanent injunctive relief, in the event such relief is in fact pursued. [20] The very reason for special safeguards to control the labor injunction lies in the fact that wrongful preliminary restraint usually

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18/ Lawrence v. St. Louis-S.F. Ry., 278 U.S. 228, 233 (1929), speaks only of "discretion" to defer the motion. In Janssen v. Shown, 53 F.2d 608 (C.A. 9, 1931), the preliminary restraint was never adjudged erroneous, but was simply withdrawn after a time by consent of the parties. And in Meeker v. Stuart, 289 F.2d 902 (C.A.D.C., 1961), also not involving a labor dispute, the Court of Appeals' five-sentence affirmance contains not a word on the issue under discussion.

19/ Respondents needn't argue that the case is "moot" -- indeed, respondents' own counterclaims are pending below -- but only that the injunctive side of the case has been "finally determined." Petitioners' mootness cases are beside the point.

20/ Petitioners cite but one case involving a labor dispute -- and that one miscited. See note 16, supra.

spells doom for the union's cause, even if later corrected, and thus the preliminary proceedings "make the issue of final relief a practical nullity." F. Frankfurter and N. Greene, The Labor Injunction 200 (1930).[21] As the Act's sponsor said during floor debate in the Senate,

> " . . . defendants in these cases are financially unable to defend themselves in court. Most of the injunction proceedings never go beyond a restraining order or at best beyond a temporary injunction." Remarks of Senator Norris, 75 Cong. Rec. 4508 (Feb. 23, 1932).

In short, the clear intent of Congress is that § 7 damages for wrongful preliminary restraint be recoverable at the earliest point compatible with orderly judicial decisionmaking. And see Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (approving "interim award" of attorney's fees before final judgment); Kahan v. Rosenstiel, 424 F.2d 161 (C.A. 3, 1970), cert. denied, sub nom., Glen Alden Corp. v. Kahan, 398 U.S. 950.

21/ See also Note, The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1594 (1970) ("in practice the temporary restraining order usually defeated the union's cause").

III. RESPONDENTS WERE ENTITLED TO RECOVER FEES AGAINST PETITIONERS UNDER SECTION 7 OF THE NORRIS-LAGUARDIA ACT REGARDLESS OF THE LIMITATIONS IN AND AMOUNT OF THE BOND POSTED

Petitioners' final arguments amount to a paradoxical contention: even though § 7 of Norris-LaGuardia grants attorney's fees to a successful defendant and even if § 7 is fully applicable here, nonetheless there can be no recovery of attorney's fees in this case. The petition offers two reasons for this result -- that the injunction bonds prepared and filed by petitioners (a) did not happen to mention attorney's fees and (b) together the bonds posted total an amount less than the reasonable fees stipulated and awarded below.[22/]

The purported conflict between Courts of Appeals on the two points just noted is, in fact, spurious. Only one of the circuit court decisions invoked by petitioners -- International Ladies Garment Workers U. v. Donnelly Garment Co., 147 F.2d 246 (C.A. 8),

22/ Fees and expenses of about $11,350 were stipulated as reasonable by the parties. Petitioners' four injunction bonds total $4,000.

cert. denied, 325 U.S. 852 (1945) -- involved a labor dispute. The others, not within the ambit of Norris-LaGuardia,[23] do not clash with the holding of the Court of Appeals below, and despite some sweeping language, Donnelly may readily be distinguished. The Donnelly court held that the injunction bonds in that case had been posted with specific reference to the Clayton Act, and could not be construed to cover attorney's fees since that Act excludes fees as an element of injunction damages. Id. at 253. Significantly, the very bond provision which led the Donnelly court to its conclusion, the bond provision in the Clayton Act, 28 U.S.C. 382 (1940), was repealed in 1948 because subsection (c) of Rule 65 of the Federal Rules contained nearly identical language. Furthermore, the subsequent broad amendments to subsection (e) of Rule 65 in 1948 insured that injunctions issued in labor disputes pursuant to Rule 65 were required to conform with the requirements of the

23/ United Motors Service v. Tropic-Aire, 57 F.2d 479 (C.A. 8, 1932), focus of major reliance by petitioners, is a patent infringement case decided some three weeks before Norris-LaGuardia was enacted.

Norris-LaGuardia Act. Thus, Donnelly is distinguishable because it pre-dated the repeal of the Clayton Act bond provision and the adoption of the broad amendments to subsection (e) of Rule 65, both of which greatly clarified the confusing and conflicting state of the law which existed when Donnelly was decided.

The Donnelly court also denied recovery in excess of the bonds because the claimants were estopped by their failure ever to protest the amount of the many bonds posted, though the litigation there lasted eight years, yielded a bill of some $103,000 in defense fees and costs, included a trip to the Supreme Court because of defendants' own pointless attempt to empanel a three-judge court, and produced four separate restraining orders with separate bonds before defendants pressed their claim for fees. Id. at 248-50, 253. Here, by contrast, the bonds were not posted pursuant to a statute that excluded fees from

recovery, [24] and there is no basis for finding respondents estopped to challenge the amount of the bonds. [25]

24/ The bonds are conditioned to pay "costs and damages," and as the court below noted, "There is nothing in the record specifying on what authority the bonds were required...." Petitioners' Appendix E at 51-52. Respondents were not given an opportunity to examine the bonds prior to their filing. Id. at 42.

25/ After the preliminary injunctions were issued on June 24, 1970, respondents immediately sought review in the Court of Appeals: emergency argument was held on June 26, and the orders vacated on June 30. Thereafter, respondents promptly filed their motions for fees. Delaying the appeal, in order to protest the amount of the injunction bonds in the trial court, would have been unconscionable in light of the unsafe conditions in the mines where the men had been ordered to resume work. In any event respondents took every reasonable step to mitigate their damages and cannot be said to have slept on their rights.

More broadly, it is significant that Donnelly's many dicta have not been followed by any other Court of Appeals in any Norris-LaGuardia case, nor reaffirmed by the Eighth Circuit, in the 27 years since the case was decided. The decision has, for every practical purpose, been strictly limited to the peculiar factual situation involved. The opinion's restrictive pronouncements concerning award of attorney's fees may be traced, as the principal opinion of the court below makes clear, to outmoded notions of the limited powers of a federal equity court, and are all the more discredited in light of this Court's recent reaffirmation of the federal equity's nonstatutory powers to award fees. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970).

(a) Petitioners advance the contention that an injunction bond conditioned to pay "costs and damages" cannot be read to cover attorney's fees. This proposition runs counter to common sense when, as here, such fees are made a recoverable element of damages by statute. And indeed, as the court below took pains to

show, such a position is not supported by petitioners' own authority.

What we have is authority to the effect that attorney's fees are not normally recoverable by a wrongfully enjoined defendant, a rule of federal common law that concededly operates unless changed by statute. Petitioners' cases merely state this rule; they do not say that the words "costs and damages" somehow fail to embrace attorney's fees. [26] Such decisions are beside the point in a case involving a labor injunction,[27] for the

[26] Aside from Donnelly, discussed supra at text, petitioners' major case is Heiser v. Woodruff, 128 F.2d 178 (C.A. 10, 1942), involving a bankruptcy proceeding. In Heiser the court denied attorney's fees to the wrongfully restrained party, even though the injunction bond in that case expressly specified that attorney's fees were covered. Plainly Heiser did not turn on "construction" of the terms of the bond, but involved application of a federal rule of damages that has no place in a case controlled by the Norris-LaGuardia Act.

[27] Any number of cases not involving labor disputes follow Heiser, and petitioners cite a few. Apart from Norris-LaGuardia or some other statute, Heiser of course states the law.

hole point of § 7 of Norris-LaGuardia was o change the federal common law and render ttorney's fees recoverable in every case nvolving wrongful restraint in a labor ispute.

The sensible ruling of the court below s that an injunction bond for "costs and amages," in a case involving a labor dis- ute, "should be construed to include all he elements of damage which are recover- ble under § 7" of Norris-LaGuardia. This s an application of black-letter law:

> "...[T]he general federal rule is that attorney's fees are not recoverable under [injunction] bonds. A federal statute may, of course, provide that in situations covered by it the bond is to include attorney's fees; and attorney's fees would then be recoverable...." (Emphasis supplied.)

Moore's Federal Practice, para. 65.10, p. 1658-59 (2d ed.). See also Donnelly, upra, at 253 ("the language of the tatute is written into the bond, though mitted by inadvertence or intention"); lgin, J. & E. Ry. v. Brotherhood of R.R. rainmen, 302 F.2d 540 (C.A. 7, 1962) Norris-LaGuardia case); Local Union No. 68, Painters v. Barker Painting Co., 4 F.2d 879 (C.A.D.C., 1928).

Petitioners say they meant to post their bonds "pursuant to" Federal Rule 65, and that their subjective intent rules out any possibility of construing the bonds in line with the applicable federal statute. Obviously the "intent" of employers seeking labor injunctions cannot determine the matter. 28/ No such litigant will seek to extend his liability nor will he admit that the Norris-LaGuardia Act has any bearing on his cause. Likewise, the Act's mandatory language concerning attorney's fees cannot depend on the trial judge's happening to announce that the bond is "pursuant to" the Act. The whole purpose of the Act is to control abuse of the labor injunction by the federal judiciary, and it makes no sense to say "that the court which issues an injunction should have the power to foreclose recovery on the injunction bond." Atomic Oil Co. v. Bardahl Oil Co.,

28/ What effect such "intent" may have on a surety's liability, as distinct from that of a principal, is not at issue here.

19 F.2d 1097, 1100 (C.A. 10, 1969). [29]
nd see 7 Moore's Federal Practice, para.
5.09, p. 1655 (failure to require proper
ecurity is "legal error and...ground for
ppellate reversal").

In any event, a bond posted "pursuant
" Federal Rule 65 presumably is affected
part (e) of that Rule[30]: "Subdivision
e) was added to allay any fears that the

/ Under petitioners' approach, the more
rroneous an injunction, the more it is
roof against injunction damages. A judge
o erroneously thinks that Norris-LaGuardia
es not bar a labor injunction in the case
hand, is obviously likely to compound
e error by concluding that the Act also
s no bearing on the injunction bond's
verage.

/ "These rules do not modify any statute
of the United States relating to
temporary restraining orders and pre-
liminary injunctions in actions
affecting employer and employee...."
65(e), Fed. R. Civ. Proc. Originally
le 65(e) specifically mentioned the
rris-LaGuardia Act; the 1948 amendment
oadened the Rule's language to its
esent scope.

Rule might modify the law relating to labor injunctions." Id., para. 65.02, p. 1611. 31/

(b) Petitioners contend that the total face amount of their injunction bonds sets the upper limit of any recovery under § 7 of Norris-LaGuardia. They point to cases holding that injunction damages in excess of the injunction bond are not normally recoverable. Once again the point may readily be conceded: in the ordinary, nonstatutory case, federal equity does not award damages beyond the bond. This judge-made limitation on injunction damages has generally been

31/ Rule 65(c), relating to injunction security, was taken "bodily" from the Clayton Act. 7 Moore's Federal Practice, para. 65.02, p. 1610. It is well known that Norris-LaGuardia was drafted with the shortcomings of the Clayton Act in mind. See F. Frankfurter and N. Greene, supra, at 184-85. In particular,

> "...the Norris-LaGuardia Act requires a bond that is more extensive in coverage than the Clayton Act, upon which 65(c) is based. Among other things the bond covers 'a reasonable attorney's fee.'"

7 Moore's Federal Practice, at 1658 n. 1.

followed in cases where the only source of injunction security is Federal Rule 65(c).[32/]

There are, however, many well recognized exceptions to the general limitation. Prior to the development of modern equity practice, it was sometimes thought that federal equity lacked power to award injunction damages apart from an injunction bond, owing to traditional limitations on the chancellor's power to award any sort of damages. See Russell v. Farley, 105 U.S. 433, 437 (1881). Today such doubts are no longer entertainable. Federal equity courts can and do exercise the power to award injunction damages quite apart from the jurisdictional fiction of a bond coerced by the court.

> "Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted."

32/ That the bonds in the present case may have been posted "pursuant to" Rule 65, as petitioners allege, would in no way limit the effect of Norris-LaGuardia's § 7.

Public Service Commn. v. Brashear Freight Lines, 312 U.S. 621 (1941). Thus, in Brashear Freight this Court approved the award of injunction damages in excess of the injunction bonds posted. See also Mitchell v. Riegel Textile, Inc., 259 F.2d 954 (C.A.D.C., 1958). And this Court has recently reaffirmed that the power to award attorney's fees is not dependent on bond or statute but is inherent in a court of equity. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970). See also Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); 7 Moore's Federal Practice, para. 54.77, at 1352-53.

As the court below explained in detail, the Donnelly dicta concerning limits on injunction damages may be traced to a narrow and mistaken view of a federal court's equitable powers. And every other Court of Appeals decision cited by petitioners simply follows the applicable rule for ordinary, nonstatutory uses.

In cases involving labor injunctions, however, § 7 of the Norris-LaGuardia Act displaces the ordinary rule of injunction damages, and authorizes full recovery of reasonable attorney's fees though in

excess of the bond approved by the issuing court. [33] This result -- the only reasonable interpretation of the language of § 7 -- is also fully in keeping with the legislative history and the broad remedial purpose of the Act. See Houston & No. Tex Motor Fr. Lines, Inc. v. Local No. 745, Teamsters, 27 F. Supp. 262, 264 (N.D. Tex., 1939); Cinderella Theatre Co. v. Sign Writers' Local Union, 6 F. Supp. 830, 831 (E.D. Mich. 1934).

Section 7 contemplates that the employer [34] seeking a labor injunction must "undertake" to reimburse all costs and damages suffered by a wrongfully enjoined party, and must also post "security in an amount to be fixed by the court." [35] As

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33/ The Court of Appeals was unanimous in holding to this effect. The narrow point that troubled Judge Kalodner is not raised in the petition.

34/ The surety's liability is another matter, not at issue here.

35/ The court below noted that the employer's § 7 "undertaking" is a strict condition precedent to issuance at any labor injunction and is implied by law whenever injunctive relief has been granted.

framed by the Senate, the employer's liability under § 7 was entirely open-ended -- the provision required "an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage . . . ." S. Rept. No. 163 of Comm. on Judiciary, on S. 935 at p. 6 (72d Cong., 1st Sess., Feb. 4, 1932). The Conference adopted the present language, so that the provision as enacted "expressly gives the court the power to fix the amount of the security in the undertaking filed by the complainant." H.R. Rept. No. 793, House Confer. Rept. to accompany H.R. 5315, at p. 7 (March 14, 1932)(emphasis added). The amount of security fixed by the court plainly does not determine the amount of the primary obligation, and the "undertaking" continues to run to the full extent of recoverable damage. See also H.R. Rept. No. 669, Rept. of House Comm. on Judiciary on H.R. 5315, at p. 9 (March 2, 1932).

Section 7 reflects congressional dissatisfaction with the injunction bond provision of the Clayton Act, which limited injunction damages to the bond and did not make room for attorney's fees. F. Frankfurter and N. Greene, supra, at

184-85. It also reflects awareness that the ordinary injunction bond would in all likelihood not adequately compensate a wrongfully enjoined party in a labor dispute. Id. at 200-201. Section 7 must be read in light of this background and the remedial objective of lessening the impact of unequal resources in judicial contests between employer and employee.

> "Laboring men are not financially able to pay the expenses which are necessary to make proper defenses. They are confronted with corporations having unlimited means . . ., and in such cases, if they have to try their case before a judge who is unsympathetic, it is necessary for their cases to be appealed. The harsh way in which the men are treated and the severity of these terrible injunctions break them down, even before trial . . . ."

Remarks of Senator Norris, 75 Cong. Rec. 4508 (Feb. 23, 1932).

Petitioners' construction of the Act would, as the court below noted, leave the new statutory liability for full injunction damages wholly dependent on "the unbridled discretion of these same district court judges against whom the whole statute

was directed." Such a construction would fly in the face of this Court's admonition that the Norris-LaGuardia Act "must not be read in a spirit of mutilating narrowness." United States v. Hutcheson, 312 U.S. 219, 235 (1941)(Frankfurter, J.). It would likewise be out of harmony with many recent decisions of this Court and the Courts of Appeals broadly construing other attorney's fees provisions in order to effectuate remedial congressional policy. See, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Lee v. Southern Home Sites Corp., 444 F.2d 143, 144-148 (C.A. 5, 1971); Gartner v. Soloner, 384 F.2d 348, 355 (C.A. 3, 1967).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19,038-19,041

UNITED STATES STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA, et al.

JONES & LAUGHLIN STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA, et al.

BETHLEHEM MINES CORPORATION

v.

UNITED MINE WORKERS OF AMERICA, et al.

REPUBLIC STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA, et al.

PRESENT: Winter, Aldisert and Gibbons,
Circuit Judges.

MEMORANDUM SUR ORDER

The plaintiffs, steel producers and owners of coal mines, applied for a preliminary injunction to restrain what they described in their verified complaints as illegal work stoppages. Following a hearing, at which a minimum of sworn testimony was adduced, the court directed the appellants "to return to their employment, process all grievances and complaints as to safety consistent with the provisions of the collective bargaining agreements, and to cease and not picket or cause to be picketed the coal mines where they are employed, or any other coal mine of any other company in which labor dispute exists as a result of safety complaints."

We reverse and remand the cause because we find that the parties were effectively denied the opportunity to develop their respective positions by erroneous rulings of the court. Because we summarily reverse and remand we deem it appropriate to set forth our reasoning.

The district court repeatedly urged counsel to "cut corners", to avoid "technicalities", and, while verbalizing a willingness to permit all to be heard, nevertheless, by persistent comment and rulings, prevented it.

The rulings of the district court in controlling the introduction of testimony were governed by its view of the applicable law which it announced in open court at an early stage of the proceedings: 1/

> THE COURT: I will enunciate a new rule. Let the Supreme Court see if they want to reconsider and follow my rule. That's how simple it is.
>
> I think under these circumstances -- this is my rule -- that where a person has a collective bargaining agreement and the men picket or do not go to work and they do not

1/ A written opinion of the district court was filed. It is a refinement of an oral opinion delivered in open court, which the trial judge stated was prepared by him at the conclusion of the first day of the hearing.

> tell their employer what their complaint is, it is the duty of the court to enforce that contract and to direct them to go back to work.
>
> That is my ruling.
>
> You can take that through the United States Court of Appeals and the Supreme Court of the United States. They might say no, that is not the rule.

We cannot accept this simplistic distillation of the intricacies of labor law, a field fraught with "technicalities" imposed by statute, court precedent, the substantive law of contracts, and the "new common law -- the common law of a particular industry or of a particular plant." 2/

This approach ignores the vital necessity in all requests for labor injunctions to accommodate the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C.A. § 104 and Section 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 185, which permits suits for violations of labor

2/ United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 579 (1960).

agreements. Because the collective bargaining agreements here did not contain a "no-strike" provision, as was the case in The Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 38 U.S.L.W. 4462 (1970), it was necessary for the district court to examine the applicability of the "settlement of disputes" doctrine enunciated in Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962). The district court found that the work stoppages were "strikes" emanating from grievances over safety conditions clearly arbitrable under the agreement and concluded that these findings alone were sufficient to justify the issuance of an injunction.

Although the court placed great reliance throughout the proceedings on our recent decision in Local 616, International Union of Electric, Radio and Machine Workers, AFL-CIO v. Byrd Plastics, Inc., No. 19,463 (June 19, 1970), we fail to see its relevancy to the case at bar. What the district court failed to recognize, both in its opinion and in the enunciation of its "new rule", is the admonition in Boys Market that injunctive relief is not appropriate "as a

matter of course in every case of a strike over an arbitrable grievance." The Court there suggested certain principles for the guidance of district courts in determining whether to grant injunctive relief:

> A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract <u>does</u> have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity -- whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

Thus, although the plaintiffs should be afforded the opportunity of presenting their case for a breach of the collective bargaining agreement, they should not be relieved of proving the present necessity for injunctive relief to rectify that breach.

The foregoing, of course, assumes the existence of a bona fide labor dispute between employees and employers. But an examination of the record does not justify such an assumption. First, the appellants raise the fundamental question whether the work stoppage was a labor dispute at all, but rather a mass protest against the federal government for its failure to enforce provisions of the Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, 91st Congress, S 2917, December 30, 1969. At the hearing, counsel for the appellants stated: "I don't think it is so much a dispute between a union and employer, so much as it is a dispute between coal miners and the United States Government."

Moreover, once being alerted to this issue, the district court failed to find whether the matter properly came within the purview of the machinery relating to "Settlement of Local and District

Disputes" or whether, as the agreement provided, it was "national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry."

In addition, a serious question was presented whether there was a work stoppage over a bona fide grievance authorized by any level of union authority -- international, district, or local. At the hearing, the district court received the unsworn statement from the president of District 5 describing the work stoppage as unauthorized and as "a political move and an attempt to embarrass the organization and the coal industry."

Finally, the district court directed that the grievance be submitted to arbitration on the basis of "safety complaints" without making a specific finding as to the presence or absence of a dangerous condition. If a dangerous condition were found to exist, two additional considerations would be appropriate: (1) whether this was a proper subject of arbitration under the contract, and if so, how; and (2) whether such amounted to "abnormally dangerous conditions". The latter consideration is

critical to an evaluation and possible application of Section 502 of LMRA, 29 U.S.C.A. § 143:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

See Philadelphia Marine Trade Associations v. N.L.R.B., 330 F.2d 492 (3 Cir. 1964).

We do not intend this discussion to serve as an outline of all the problems encompassed by the proceedings below. We have set forth these observations solely to indicate those issues which are discernable from an examination of the truncated record, briefs, and oral argument. While recognizing that the district court has wide discretion in the reception of evidence at a preliminary hearing and that "[t]he award of an interlocutory injunction by courts of equity has never been regarded strictly as a matter of right," Yakus v. United States, 321 U.S. 414, 440 (1944); Scripps-Howard Radio v. FCC, 316 U.S. 4, 10 (1942), we nevertheless believe that it is fundamental that

parties to proceedings such as these be given the opportunity to be heard, properly.

We therefore summarily reverse and remand these cases to the district court without prejudice to a request for a hearing de novo on the application for a preliminary injunction. We emphasize that we have not reached the issue of the merits of the request for a preliminary injunction. Our decision is based solely on our conclusion that the trial court's application of erroneous concepts of procedural and substantive law denied the parties an adequate opportunity of presenting appropriate evidence and argument.

ORDER

After consideration of appellants' motion and oral argument thereon, for the reasons set forth in the foregoing memorandum, IT IS ORDERED,

That the orders of the district court dated June 25, 1970, be and the same are hereby reversed and the cause remanded to the district court for proceedings not inconsistent with the views set forth in the memorandum.

Each side to bear its own costs.

BY THE COURT,

/S/ Ruggero Aldisert
Circuit Judge

Dated: June 30, 1970